Constitutional Conversations

Acadamh Ríoga na hÉireann
Royal Irish Academy

MASON
HAYES &
CURRAN

Contents

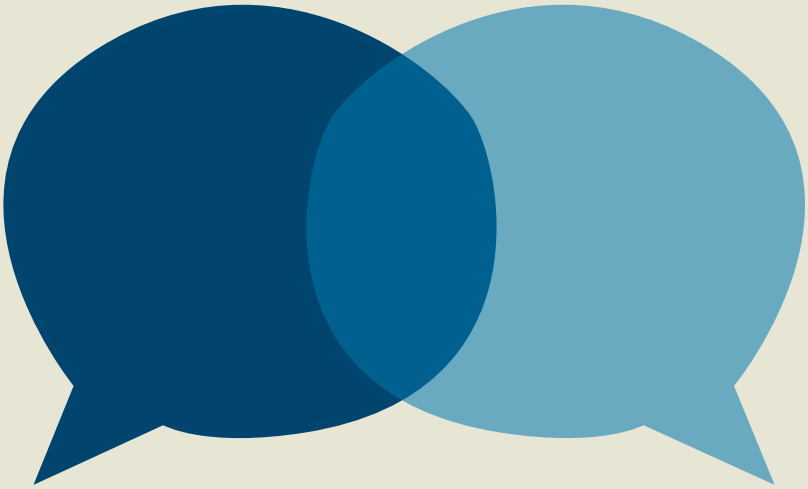
Introduction

This *Constitutional Conversations* series is the initiative of the Ethical, Political, Legal and Philosophical Studies Committee within the Royal Irish Academy. It follows on from the committee's contribution to the president of Ireland's Ethics Initiative, when, in 2015, the committee organised an Opinion Series that featured a range of experts reflecting on the ethical dimensions of topics ranging from neuroscience and emerging technologies to whistleblowing and the constitution. The *Constitutional Conversations* series, which began in 2016, built upon the interest in the ethics comment pieces by seeking to bring people together for an open discussion of topics of contemporary importance. The format, which developed as the series progressed, was designed to encourage maximum debate. Speakers were chosen to introduce aspects of the subject under consideration, and discussion was then opened up to the audience. The events were conducted under the Chatham House Rule, whereby comments are not attributed, so as to allow open and free discussion. As the series developed, a circular seating arrangement was favoured; this suited a style of proceedings that was less about listening to experts and more about opening up dialogue and hearing a range of voices. Although introductory speakers were always experts, they were not always drawn from academia; instead, they were often from government, industry and legal practice. One memorable group of young people introduced a session reflecting on their experiences of the digital world. The audiences too were diverse, and a variety of people new to the activities of the Royal Irish Academy were drawn into Academy House for what was often very lively conversation. A summary of all of the conversations is provided here. These were drawn up by rapporteurs, usually postgraduate students, who have presented their perceptions of the events and their sense of how the conversations developed. We are grateful to them as well as to all the speakers who made these conversations so successful.

The series moved from Dublin to the newly opened Law School Building in Queen's University Belfast for a conversation on the issue of Brexit and Ireland as that issue gained potency following the referendum in the UK in June 2016. This conversation, and one that took place in May in advance of the referendum, benefited from cooperation and support from the Tensions on the Fringes of the European Union (TREUP) project and an Erasmus + grant, which allowed a range of speakers to be brought in from across Europe to explore options for the way forward.

The whole series benefited from sponsorship from Mason, Hayes and Curran, and the Royal Irish Academy is particularly grateful for that support.

Professor John Morison MRIA
Chair of the Ethical, Political, Legal and Philosophical Studies Committee
January 2017



Constitutional Conversations, No. 1 of 6

Constitutions, referendums and the family

Royal Irish Academy, 2 March 2016

Report by rapporteurs Amanda Reynolds & Gerard Maguire

Acadamh Ríoga na hÉireann
Royal Irish Academy

MASON HAYES & CURRAN

INTRODUCTION

The aim of this conversation, the first of the Constitutional Conversations 2016, was to prompt thought and discussion in relation to recent constitutional changes, namely the 31st Amendment concerning children and the 34th Amendment on marriage. The planned structure of the conversation was for 30 minutes of overview of the topic by Dr Fergus Ryan, followed by an hour of open-floor conversation.

DISCUSSION

The focal point of this conversation was recent constitutional reform as it relates to the rights of the child, with emphasis on the 31st Amendment to the Irish Constitution, which guarantees to safeguard the natural rights of the child whether born inside or outside of marriage. The changing parameters of marriage in Irish society were elaborated upon through referencing the recent referendum to put into action the 34th Amendment to the Irish Constitution, which allows couples to marry without distinction as to their gender. Both topics explored the evolving and changing role and shape of the family in modern Irish society.

It was remarked that although change in Ireland in recent years has been revolutionary, it still does not account for all aspects of family diversity. Even in the wake of the marriage referendum, there are still categories of family unrecognised and excluded by the Irish Constitution; for example, Articles 41 and 42 define a family as being based on marriage, therefore excluding cohabiting couples with children and unmarried lone parents, who by default fall outside the constitutional definition of family. It was noted that there may be a discrepancy in principles of equality in relation to Article 40.3, in which the unmarried mother has personal rights in respect of her child whereas an unmarried father has no constitutional rights in respect of his child at all.

Although the marriage referendum on the face of it seemed to promote inclusion and acceptance, the Constitution still does not promote diversity. The institution of marriage, endorsed by Art. 41.3, is still the 'gold standard' in Irish law. The topic of civil partnerships was discussed briefly, and the question was asked whether it was positive or negative that what was viewed as a 'consolation prize' by many is now being phased out. Now that the right to marry is extended to all, having the option of civil partnership may serve to de-incentivise marriage. However, the removal of civil partnerships limits options for couples, particularly those who would prefer its totally egalitarian nature.

A NUMBER OF CENTRAL QUESTIONS WERE POSED

Should marriage be protected at the expense of other familial arrangements? Or is the notion of privileging marriage out of kilter with society and central principles of equality? In the same vein, is the statement in the 31st Amendment as it relates to the rights of children too non-committal to defend their 'natural rights as far as practicable'; is this too subjective? Does this promote the economic and social rights and equality of all children regardless of their wealth or inherited conditions?

ADDITIONAL QUESTIONS AND OBSERVATIONS RAISED DURING OPEN FLOOR DISCUSSION

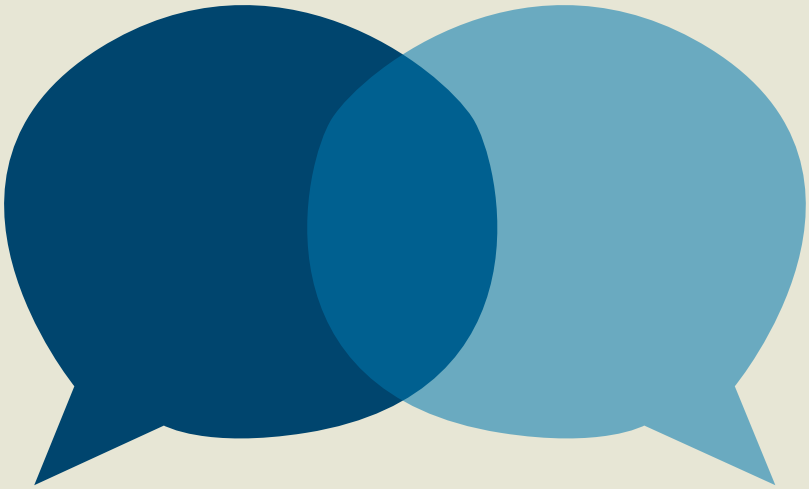
- What may be next in Ireland for the subject matter at hand? Is there the political will for further reform, and will it be satisfactory?
- If the Irish judiciary took international human rights law into consideration more effectively, might there be a somewhat faster process of broadening the constitutional definition of the Irish family?
- Should the marital family/any family hold a privileged position within Irish law at all?
- Is there a need for Article 41 within the Irish Constitution at all? Has it been useful in any instance?

CONCLUDING REMARKS & KEY POINTS

Towards the latter part of the conversation, the focus of the group turned to children's rights and the best interests of the child, with policy being viewed through a practical lens rather than an academic one. The notion of a two-tier system (arguably removed by the 31st Amendment) that discriminated against children born outside of rather than inside marriage was subject to much criticism. Articles 41.4 and 42A were stated to amount to a positive step forward but could have been more radical. It was discussed that Irish policy needs to be in line with the rhetoric. The government cannot realistically promote marriage and the family while at the same time cutting child benefits and increasing childcare costs.

Notwithstanding the radical change Ireland has seen, particularly in the past 24 months, there is still a tendency to over-constitutionalise and award special privilege to the family based on marriage. Judging by the conversation in this meeting, possible recommendations for reform that members of the group may suggest include early intervention systems in schools that provide for mechanisms to aid hearing and listening to the voice of the child and the effective provision of legal aid and access to it. It was suggested that in many instances, legal representation appointed to children served a role more in line with being an adviser to the court as opposed to representing the best interests of the child. It was also viewed that child protection proceedings require radical reform. The reality for children in the present Irish legal system was thought to be stark. Ireland still has a tendency to romanticise traditional values and promote marriage as an ideal, or the pinnacle of Irish society and unions. The Constitution is a living document with the ability to evolve and stay relevant to the modern Irish family and to copper-fasten instead of providing a barrier to citizens' rights.

Convenor: Noelle Higgins, Maynooth Universtity
Paper-giver/Chair: Dr Fergus Ryan



Constitutional Conversations, No. 2 of 6

Reviewing constitutions: the role of constitutional conventions

Royal Irish Academy, 28 April 2016
Report by rapporteur Roland Gjoni

Acadamh Ríoga na hÉireann
Royal Irish Academy

MASON HAYES & CURRAN

This report summarises the second session of Constitutional Conversations 2016, focusing on the process of reviewing constitutions and the role of constitutional conventions. The conversation aimed at reflecting on the recent experience of the Irish Constitutional Convention (2012–14) where a deliberating body of 100 individuals (66 randomly selected citizens, 33 elected representatives of the parliamentary parties from the Republic of Ireland and Northern Ireland, and an independent Chairman) deliberated selected aspects of the Constitution and put forward a set of recommendations for constitutional change to the Oireachtas. Three panellists involved in various capacities in the Convention were asked to address the value of the recent Convention, the desirability of a similar body to address fresh issues, and ways in which the effectiveness of this formula may be enhanced in the future. The presentations on the origins of the Convention, its composition, working principles and methods were followed by discussions on the legitimacy of the Convention, the future use of citizen-orientated processes to review constitutions and ways to improve the model in the future.

The Irish experience was viewed as part of an emerging global trend of introducing citizen-orientated decision-making mechanisms in various democracies such as Estonia, Romania, Belgium, Luxembourg and Iceland. After the financial crisis of 2008–09 all Irish political parties committed to some form of constitutional reform prior to 2011 elections, and citizen engagement was viewed as an appropriate way to restore faith in the democratic system.

Panellists shared with the participants their views on the challenges and the lessons learnt during the most recent constitutional review process. Legitimacy was one of the key elements to measure the success of all stages of the review process. First, there should be input legitimacy, which has to address the issue of representativeness of the members and the relevance of the questions selected for deliberation. Second, one has to assess the output legitimacy, or the extent to which the process yields tangible results in terms of actionable and meaningful proposals for constitutional interventions that are followed through. Finally, the overall process between input and output should be legitimate and seen as such by the general public (thorough legitimacy).

Although its composition and the issues to be deliberated were established by the Oireachtas, the fact that citizens composed a two-thirds majority in the Convention was considered as one of the main values of the Irish experience. To ensure input legitimacy, the working methods and rules of procedure were designed to respect gender equality, the equality of voice between citizens and politicians and the promotion of the representation of different viewpoints through civil society organisations (CSOs). On the other hand, the fact that the Oireachtas has neither considered nor acted upon various other reports of the Convention was identified as an outcome limitation of the Irish experience.

Discussants were particularly critical of the lack of any follow-up on two important issues that the Convention deliberated and recommended changes on, namely the provision of Articles 41.1 and 41.2 on the role of women as well as the right of citizens residing outside the State to vote in presidential elections. This was found to be of particular concern since the Committee on the Elimination of Discrimination against Women (CEDAW) has repeatedly criticised Ireland for maintaining outdated constitutional clauses on the role of women in the home, and failing to encourage greater participation of women in public life.

Discussions also focused on the usefulness of the constitutional convention model, the need to enhance the use of direct democracy in the Irish political process, the type of issues which should be deliberated in future conventions and additional process design issues. With regard to the future applicability of such a model, participants offered broad support to expand the use of direct democracy by exploring the introduction of some form of direct democracy by which citizens can have more say in the political process, using the language of the Irish Free State Constitution of 1922 on direct democracy as a starting point. Others suggested that the Swiss model of widely used citizen initiatives requiring the collection of a mandatory number of citizen signatures should also be considered.

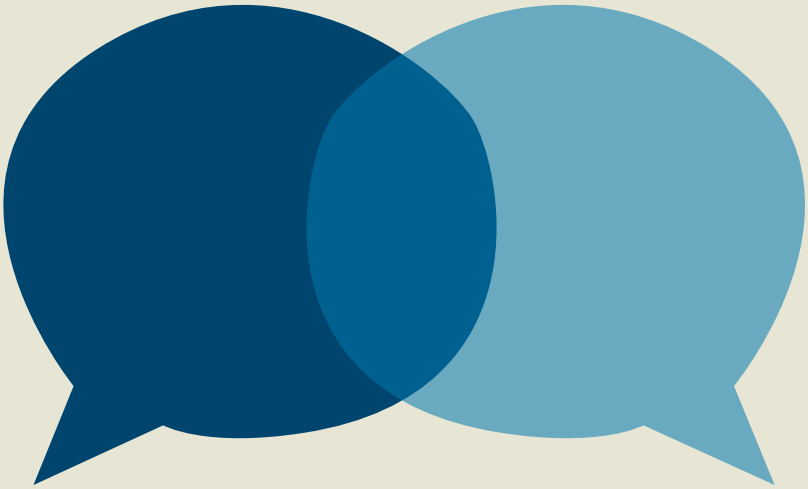
One of the suggestions was that if the convention mechanism is used in the future, it should deliberate on a limited number of issues which are very important and precious to Irish society as a whole. Such issues may include the ban on abortion enshrined in the 8th Amendment of the Irish Constitution or the role of women. In retrospect, some participants thought that the voting age and presidential term of office were not sufficiently important or controversial to be in the scope of work of the last convention.

In order to avoid the possibility that political parties indirectly capture or instrumentalise constitutional review bodies, participants emphasised the need for a more inclusive and transparent process in defining the questions to be put forward to the convention, the manner in which questions are framed, and the procedures for selecting citizens, independent experts and civil society groups participating in or addressing the convention.

In general, participants suggested that since the Constitution is a 'living document' it is better to make the review processes more open, democratic and inclusive. Future efforts should focus on broader inclusion of minority communities, particularly the Irish traveller and 'new Irish' communities. The state should invest more time and resources in educating citizens so that they make more informed decisions about the complex constitutional issues at hand. The work of any future convention also needs to be accompanied by a well-designed and aggressive public awareness campaign to attract broader citizen interest.

In conclusion, participants agreed that given the limited scope and mixed results of the first Irish Constitutional Convention, the model must be improved and then replicated so that citizens can make a real and meaningful contribution to the constitutional review processes.

Convenor: John Coakley MRIA
Chair: David Farrell MRIA
Panellists: Tom Arnold MRIA, Director General, IIEA; Art O'Leary, Secretary General to the President of Ireland; Jane Suiter, Director of the Institute for Future Media and Journalism, School of Communications, DCU



Constitutional Conversations, No. 3 of 6

A new relationship? Brexit, Republic of Ireland and Northern Ireland

CONSTITUTIONS AND THESE ISLANDS: BEYOND BREXIT (PART ONE)

Royal Irish Academy, 6 May 2016

Report by rapporteurs Andrew Godden and Conor McCormick

Acadamh Ríoga na hÉireann
Royal Irish Academy

MASON HAYES & CURRAN

Erasmus+

Queen's University Belfast

Tensions at the EU's Fringes

INTRODUCTION

This event was the third in a series of six conversations on constitutional developments across the island of Ireland. More specifically, it was the first of a two-part dialogue on the implications of 'Brexit' for relations between the various jurisdictions of these islands. From the outset, participants were made aware of the importance of this particular entry to the conversational series, due to the seriousness of the subject matter and the dangers for British-Irish relations and North–South cooperation of the UK's exit from the EU. It was therefore felt appropriate that a discussion of such salience be undertaken by leading scholars, policymakers and governmental representatives from the Republic of Ireland and Northern Ireland. In addition, it was agreed that the discussion would best be facilitated by a conversational format, where all participants were free to contribute, as opposed to the more restrictive milieus of lectures and presentations.

SETTING THE SCENE – ALTERNATIVE FUTURES

The dialogue began with a discussion of the overarching issues pertaining to the Brexit debate in terms of its legal and constitutional entailments. To that end, the conversation unfolded in two parts. First, there was an overview of the potential repercussions for the British Constitution – with particular emphasis on relations between the central UK government, the devolved nations and the European authorities – and its reconfiguration in a post-Brexit settlement. Second, there was consideration of the procedural and legal implications of the Brexit scenario under European law.

If one observation can be drawn from this panel, it is that the Brexit debate helps to throw the contours of the British Constitution into sharp relief. This fact was most apparent when considering how withdrawal from the EU may affect the structure of the British state. Essentially, since withdrawal would have consequences not only for the UK but for the devolved regions also, questions arose concerning the situation whereby the devolved regions wished to remain as members of the EU while the UK as a whole opted to leave. In this situation, three outcomes were deemed likely. The first, and least troublesome, involved the smaller regions leaving the EU with the rest of the UK. The second, and more problematic, would see these regions negotiating their own relationships with Europe. In that context, areas such as the Channel Islands, Gibraltar and Cyprus were cited to illustrate how smaller territories can often negotiate arrangements with Europe separate from those of their national governments. Most controversial of all, however, was option three, which involved the secession of one or more of the devolved regions from the UK in order to reintegrate with Europe. Although traumatic for the UK, this scenario was determined to be plausible, at least with regard to Scotland, where the Scottish Nationalist Party remains committed to a second referendum on independence as well as full membership of the EU. Indeed, when one considers that the UK government may have to disturb the Sewel Convention and issue an order under section 30 of the Scotland Act 1998 in the event of Brexit, it is not inconceivable that Scottish separatism could rise to such levels.

The next part of the discussion revolved around article 50 of the Lisbon Treaty. In the course of the debate, it was argued strongly that even though the UK's withdrawal could only be effected under article 50, the provision itself is far from straightforward and the process of secession could be time-consuming. This is because the UK would be compelled to negotiate the terms of its withdrawal within the European Council, along with its future relationship with the EU. The Republic of Ireland would be unable to play a significant role in these negotiations since the resulting agreement between

the UK and EU would only require a qualified majority in the Council. Moreover, having concluded the negotiations, the UK would find itself in a weaker position outside the EU, having no input into the rules of the Single Market or wider European policy. It was also suggested that other European states could veto the extension of the treaties to the UK after its withdrawal in order to deter other member states from leaving. Similarly, it was argued that any attempt to rejoin the EU may be thwarted by the Council, as member states would wield the power of veto. In the end, however, the prevailing opinion was that the prospect of the UK rejoining the EU after Brexit, or of its rescinding its withdrawal application pre-Brexit, would only emerge if a serious attempt was made by Scotland to leave the UK.

KEY ISSUES FOR HUMAN RIGHTS – NORTH AND SOUTH

The second conversation was unlike any other in the course of the day's proceedings, as it was almost completely dichotomous in nature. On one side of the debate there was the argument that Brexit would not have any adverse consequences for human-rights protections in the UK, since withdrawal from the EU would have no affect on the UK's membership of the Council of Europe and the European Convention on Human Rights (ECHR). This contention was then extended into a criticism of the Court of Justice of the European Union (CJEU), due to a perceived lack of accountability and an often poor standard of judicial reasoning, as exemplified by Opinion 2/13.[1]

A number of submissions were made in response to these arguments. First, withdrawal from the EU could encourage withdrawal from the ECHR. Second, the UK courts would be unlikely to 'fill the vacuum' left by repeal of the Human Rights Act 1998 (HRA). Third, the British Constitution is bereft of human-rights values. And fourth, the quality of the CJEU's reasoning is improving, even though it is not a common-law court, and its accountability lies in its relationship with the other EU institutions. Several discussants also rejected a claim that the CJEU was less amenable to engaging in dialogue with domestic courts and elected bodies than other constitutional courts, making reference to its dialogue with a local German court in Pfleiderer by way of example.[2]

These submissions were met with the argument that the UK has enshrined greater protections for the LGBT community, for example, than is the case under EU law. Further, the British Constitution does contain values, as underscored by age-old institutions such as the royal oath and the Established Church. And, finally, the UK Supreme Court could be regarded as more accountable than the CJEU under the doctrine of parliamentary sovereignty. At the end of the debate it was suggested that there are two views of human rights, one of which holds that they are legalistic rules, while the other sees them as part of a wider dialogue between human beings. Ultimately, it may simply be the case that the former set of arguments belongs to the first camp, while the latter belongs to the second.

Discussion then shifted to the impact of Brexit on human-rights protections in the Republic of Ireland and Northern Ireland, and with respect to the refugee crisis. In each context, the debate was again polarised, albeit unevenly. In the first context, one view was that Brexit would have no impact on human-rights provisions in the Republic of Ireland other than in minor situations involving Irish citizens working in the UK. Against this, it was argued that Brexit could lead to an upsurge in violence in Northern Ireland, which would have massive consequences for the Republic. In terms of the Northern

[1] *Opinion 2/13 on EU Accession to the ECHR* (18 December 2014).
[2] Case C-360/09 *Pfleiderer* (14 June 2011).

Irish experience, the prospect of a Northern Ireland Bill of Rights was mooted briefly, although it was generally agreed that there is no political appetite for such a bill in the current climate. One discussant believed that the UK's obligations under the British–Irish Agreement (BIA 1998) in international law would be unaffected by Brexit, suggesting that the relevant terms of the BIA are fulfilled by sections 6 and 24 of the Northern Ireland Act 1998 alone, which could be preserved by careful legislative drafting should the HRA be repealed following Brexit. Another discussant referred to the potential for imperilling good relations between unionist and nationalist communities in the event of Brexit more generally, arguing that the notion of shared sovereignty underlying the Belfast (Good Friday) Agreement was supported by the UK and the Republic of Ireland both being members of the EU. The conversation then ended with a brief examination of Brexit and the European migrant crisis, with one perspective holding that the catastrophe can only be ameliorated by a strong EU, and the other holding that current EU arrangements – including the Dublin Convention – have only exacerbated the problem.

CITIZENSHIP AND FREE MOVEMENT IN A POST-BREXIT REPUBLIC OF IRELAND

As highlighted by one contributor, the socio-economic effects of a vote to leave are of great importance for the Republic of Ireland. This is because the Republic has long-standing reciprocal arrangements with the UK regarding the rights of each country's citizens. In that context, three issues were identified in the course of discussions: reciprocal travel arrangements between the two states, the implications of border controls in a post-Brexit setting, and access to welfare provisions for Irish citizens based in Britain or Northern Ireland. In the first instance, it was agreed that the UK's withdrawal from the EU would have little impact on reciprocal travel arrangements between the UK and the Republic of Ireland. Both countries have operated a Common Travel Area for many years, and have opted out of the Schengen Agreement, as reflected by Protocol 20 of the Lisbon Treaty. Consequently, the prospect of a reduction in British–Irish travel was given little weight. Trepidations were still voiced, however, over the scenario whereby border patrols are reintroduced between Northern Ireland and the Republic.

A common argument from all participants was that such patrols would be extremely difficult to coordinate and would cause unnecessary hardship and division between the two nations, as was the case during the Northern Ireland conflict. Nevertheless, it was agreed that neither country would favour a return to border controls in the event of Brexit.

Greater problems arose when considering the issue of welfare provisions between the two states. British and Irish citizens are treated equally in both countries as regards access to welfare support. Indeed, it was suggested that the UK and the Republic of Ireland provide greater support for each other's citizens than to other Europeans. This arrangement may pose problems if the UK withdraws from the EU. Since the EU insists on EU citizens being treated as well as non-EU citizens in the provision of welfare, any attempt by the Republic of Ireland to give preferential treatment to British citizens after Brexit could result in the country having to extend such arrangements to all EU visitors. Similarly, if the UK decides to remain, British–Irish cooperation on welfare may come under greater scrutiny by the European authorities.

Further points of discussion related to the difficulty of concluding British–Irish trade agreements after Brexit, since the power to negotiate with third-party states lies within the competence of the EU, and not its constituent members. One discussant even broached the benefits of Brexit for the Republic

of Ireland, arguing that large enterprises, such as banks and financial institutions, may relocate from London to Dublin in pursuit of better terms. In the midst of these arguments, the dominant view remained constant that the Republic would monitor the Brexit campaign and 'plan for the worst, yet hope for the best'.

THE JUSTICE SYSTEMS AND PROBLEMS OF POLICING

In the subsequent discussion, participants argued that a vote to leave the EU would affect the policing arrangements of the UK and the Republic of Ireland at the global and domestic levels. It was agreed from the outset that, in the modern era, criminality is now globalised and stretches across borders. Thus the importance of global security cooperation cannot be underestimated. Against this backdrop, assertions were made that Brexit would have a severe impact on the UK's ability to defend itself, since it could result in the UK withdrawing from Eurojust, the Schengen Information System and Europol, thereby distancing itself from its European allies. It could also undermine the UK's commitment to accede to the Prüm Convention. In a similar vein, participants suggested that the influence of the wider European discourse on UK security measures would wane after a vote to leave the EU. In that event, legislative developments such as the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (NI) 2015 – a bill influenced by European concerns on human trafficking – would become rarer. Not only this, but the UK's ability to influence the European discourse would also be at risk. This, it was argued, would have particular repercussions for British efforts to export its policing and intelligence practices around the world in the hope of raising human-rights standards in poorer nations.

Further security-related problems were identified at the national level. Overall, these related to the EU's ability to supervise the policing practices of the UK and the Republic of Ireland. In the course of this discussion, particular praise was devoted to the ombudsmans' offices in Northern Ireland and the Republic. These institutions were cited as two of the most advanced of their kind, aided largely by European jurisprudence on human rights vis-à-vis the security services, such as McCann v UK.[3] The opinion was then expressed that institutional safeguards such as these could very well be jeopardised by Brexit, along with more general cooperation between the British and Irish security services – co-operation that has only been possible through the painstaking efforts of each country since the days of the Northern Ireland conflict, in tandem with the supervision of the EU. Concerns about such safeguards were supplemented by a granular analysis of other legal processes underpinned by EU law at the national level, including the increased efficiency brought about by EU law in extradition and deportation cases, as well as cross-border small-claims, digital-contract and child-contact proceedings.

The EU was characterised as an 'external guarantor' of security and justice systems across Europe throughout these discussions, something which Brexit was said to put at risk. This function has always been of great importance in the British–Irish context, since both countries have experienced significant levels of distrust over the course of their histories. Ultimately, then, any attempt by the UK to secede from the EU could endanger the gains that have been made in recent years, not only in terms of the UK's ability to contribute to, and benefit from, EU-wide security measures but in terms of the political capital that has been cultivated with its closest neighbour and ally, the Republic of Ireland.

[3] *McCann v United Kingdom* (application 18984/91) (1995) 21 EHRR 97.

THE WAY AHEAD

In summary, the overwhelming sentiment of the discussants was that withdrawal from the EU would be to the disadvantage of the UK and the Republic of Ireland. Not only would it encumber the ability of Irish citizens based in Britain or Northern Ireland to reap the socio-economic benefits of the Single Market but it could lead to curtailments of their human rights and imperil the national security interests of each country. Indeed, such are the consequences of EU secession that it could even lead to the break-up of the UK itself. In light of this dialogue and the implications that it raises, the participants looked forward with great interest to the next event in the conversational calendar, 'Part Two: After the Vote', which will be held at Queen's University, Belfast on 15 September 2016.

PROGRAMME

Convenor: John Morison MRIA

INTRODUCTION AND WELCOME
John Morison MRIA, Chair of the Ethical, Political, Legal and Philosophical Studies Committee, RIA

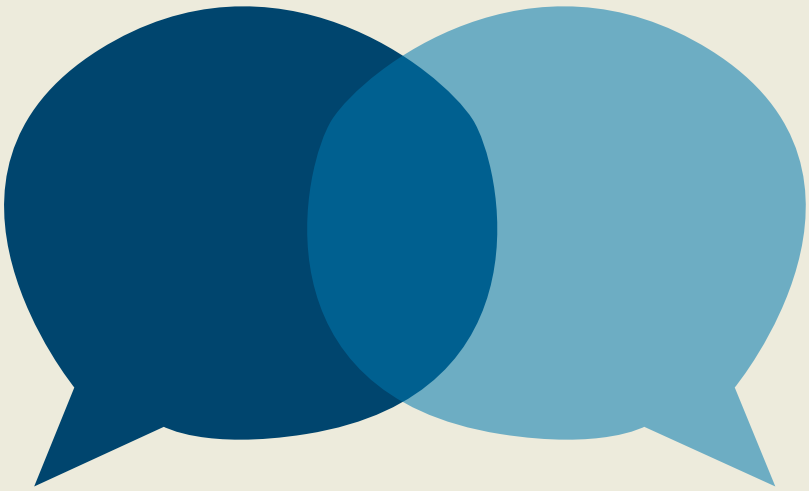
SETTING THE SCENE: ALTERNATIVE FUTURES
Sionaidh Douglas-Scott, Queen Mary University of London
Gavin Barrett, UCD

KEY ISSUES FOR HUMAN RIGHTS – NORTH AND SOUTH
John Larkin QC, Attorney General for Northern Ireland
Christopher McCrudden FBA, Professor of Human Rights and Equality Law, QUB
Chair: Imelda Maher MRIA, Humanities Secretary, RIA; Sutherland Chair of European Law, UCD

CITIZENSHIP AND FREE MOVEMENT IN A POST-BREXIT IRELAND
Eleanor Spaventa, Professor of European Law, Durham University
Rory Montgomery, second secretary general, EU Division, Department of the Taoiseach
Chair: Dagmar Schiek, Professor of Law, Jean Monnet ad personam Chair for EU Law and Policy, QUB

THE JUSTICE SYSTEMS AND PROBLEMS OF POLICING
Kieran FitzGerald, Garda Síochána Ombudsman Commission
Claire Archbold, Deputy Departmental Solicitor for Northern Ireland
Georgina Sinclair, Strategic Expertise International (SEI) and Senior Research Fellow, Institute of Commonwealth Studies
Chair: David Phinnemore, Professor of European Politics and Jean Monnet Chair in European Political Science, QUB

THE WAY AHEAD
John Morison MRIA, QUB



Constitutional Conversations, No. 3 of 6

Northern Ireland at the edge: what's next after Brexit?

CONSTITUTIONS AND THESE ISLANDS: BEYOND BREXIT (PART TWO)

Queen's University Belfast, Thursday, 15 September 2016

Report by rapporteurs Andrew Godden and Conor McCormick

Erasmus+

Queen's University Belfast

Tensions at the EU's Fringes

Acadamh Ríoga na hÉireann
Royal Irish Academy

The UK in a Changing Europe

MASON HAYES & CURRAN

INTRODUCTION

Following the success of the first half of this dialogue on 6 May 2016, this event was held to discuss the implications of the UK's decision to leave the European Union (EU) as a result of the referendum on 23 June. The conversation opened with an appraisal of the complex issues now facing these islands as they grapple with the Brexit scenario, including the fact that the nations of the UK have varying aspirations as regards their future relationship with the EU, and the fact that Northern Ireland requires special attention given its geographical, social and economic ties with the Republic of Ireland. It was seen as unfortunate that the UK government has so far given few details on how Brexit will be achieved and what the post-Brexit landscape will look like. This has created the impression in some quarters that important issues, particularly those relating to Northern Ireland, will fall foul of government ignorance during the withdrawal negotiations. At the same time, it was suggested that the present uncertainty creates an opportunity for interested parties to contribute to the debate in order to shape the withdrawal process going forward.

INSIDE, OUTSIDE AND THE POSSIBILITIES OF 'SPECIAL STATUS'

The first session began by focusing on the Common Travel Area (CTA) between the UK and Ireland and how this arrangement will fare after Brexit. Attendees were reminded that during the previous conversation in May, the Republic of Ireland's concerns were made clear regarding the post-Brexit implications for British–Irish relations. These concerns were heightened in the aftermath of the referendum, with ministers in Dublin engaging immediately with their counterparts in Belfast, London and Brussels with a view to clarifying, *inter alia*, the continuance of the CTA. Complicating these efforts is the fact that the CTA pre-dates the entry of both countries to the EEC, and the fact it has a unique status in EU law via Protocol 20 TEU and TFEU which has been considered by the UK Supreme Court.[1]

Particular concern emanated from the EU's insistence on equal treatment for all of its citizens as regards their right to free movement in third-party countries. This may prevent the UK from giving preferential treatment to Irish citizens while restricting the rights of other EU citizens to enter the UK. A note of optimism was sounded, however, when it was recalled that Irish citizens have always had a special place in British immigration law that could well continue in a post-Brexit environment, even if the specificities of the CTA require alteration.

Next, an exploration of how Greenland's experience of exiting the EEC may be instructive to the UK took place. Greenland and the UK were distinguished initially in two respects. First, Greenland exited the EEC before the withdrawal mechanism in Article 50 even existed. Second, unlike the UK, Greenland's exit could not be regarded as the secession of a *member state* from the EU, since Greenland is merely a territory of the Kingdom of Denmark, which remains a member state. Nevertheless, Greenland's experience was deemed relevant in one important respect. With warnings of renewed violence in Northern Ireland and the prospect of Scottish separatism in the event of UK independence, a case could be made for a Greenlandic-style arrangement whereby England and Wales are allowed to withdraw from the EU while Northern Ireland and Scotland are permitted to remain. Under this 'reverse Greenland' arrangement the UK would remain a member state of the EU but its voting rights would be reduced to match the aggregated population of Scotland and Northern Ireland. This would have

[1] *Patmalniece v Secretary of State for Work and Pensions* [2011] UKSC 11.

the advantage of placating the 'leave' nations while accommodating those which voted to remain. Yet this course of action would also have far-reaching consequences for the internal constitutional settlement of the UK and leave questions over the future relationship between England/Wales and the EU unresolved. Whether or not the Greenlandic model can or will be implemented as a result of Brexit, it certainly shows that the EU is capable of negotiating novel constitutional settlements.

ALTERNATIVES TO EU MEMBERSHIP – EEA, EFTA AND SPECIAL ARRANGEMENTS

The next panel began with an overview of how Liechtenstein's dealings with the European Free Trade Association (EFTA) and the European Economic Association (EEA) may translate to the Brexit scenario. In December 1992, despite its membership of EFTA, Switzerland voted to reject membership of the EEA, whereas the Principality of Liechtenstein – itself an EFTA member – voted to join the EEA in 1992 and again in 1995. As a result, the bilateral agreements underpinning the already existing customs union and open border with Switzerland required modification.

In the years since 1995 Liechtenstein's membership of the EEA has been deemed a success. Not only is Liechtenstein able to participate in and benefit from the EEA, with equal representation in the relevant EFTA and EEA bodies, but it does so in the absence of obligations relating to the EU's policies on agriculture, trade and security, for example. It has also been able to opt-out of the normal requirements pursuant to the EEA's policy on the free movement of persons. This arrangement was given 'quasi-permanent' status in 2004 by virtue of its incorporation as a sectoral adaptation to Annexes V and VIII of the EEA Agreement, which govern the free movement of workers and the right to establishment, respectively. Consequently, while the right to free movement of persons still applies to Liechtenstein, people wishing to live in the region must obtain a residence permit, the availability of which is subject to a fixed quota per annum. The Liechtenstein arrangement may therefore hold some appeal for the UK, given the country's well publicised reservations on the free movement of persons. Such a settlement would, however, be contingent upon the UK's willingness to become an EFTA EEA state upon leaving the EU and its readiness to cooperate with the other EFTA countries.

Whereas the Liechtenstein example may be regarded as the kind of arrangement that could benefit the UK if it decided to remain a member of the EEA, Switzerland was highlighted as an example of what the UK could face upon leaving the EEA as well as the EU. As mentioned previously, Switzerland is a member of EFTA; however, instead of joining the EEA or the EU, Switzerland's social and economic relations with the European bloc are governed by a plethora of bilateral arrangements. One of these is the 1999 agreement on the free movement of persons (FMP agreement) which entitles Swiss citizens to free movement across the EU, with European citizens enjoying the same right with regard to Switzerland. This arrangement has been under threat, however, since the Swiss people and cantons voted for greater immigration controls as part of a constitutional amendment in 2014. If enacted, this amendment would require the introduction of more restrictive immigration controls within three years of coming into force, and would therefore be incompatible with the FMP agreement.

As a result of this incompatibility, the Swiss government has been forced to attempt renegotiation of the FMP agreement. These discussions are complicated, however, by two other factors. First, the 120 or so bilateral agreements with the EU are subject to a guillotine clause, meaning that if one of the agreements ceases to apply – in this case, the FMP agreement – then the entire regime will collapse. Second, notwithstanding the threat of the guillotine clause, the Swiss government has announced that it will

use a unilateral safeguard clause to introduce the immigration controls even in the absence of agreement with the EU. This constitutional impasse may be indicative of what the UK could face if it remains within the single market after Brexit and attempts to curtail immigration. Indeed, the Swiss experience not only demonstrates the difficulty in *re*-negotiating with the EU, but underscores the problem of *reaching* agreement in the first place. It took seven years, for example, for the FMP agreement to be settled, which is considerably longer than the two years that are envisaged for the Brexit negotiations.

CONCLUSIONS

Of all of the conclusions to be drawn from the conversation, three were of particular importance. First was the acknowledgement from all concerned that the post-Brexit scenario is dangerous and uncertain, owing to its uncharted territory and the paucity of information from the UK government at present. Second, the administrations in Belfast, Dublin and London are committed to working together in order to preserve the integrity of the CTA and the open border between North and South, and will carry these efforts forward at the North–South Ministerial Council and similar fora. And finally, while the EU cannot be described as a 'nimble negotiator', the experiences of countries such as Greenland, Liechtenstein and Switzerland have shown that there is considerable scope for close ties and bilateral relations between the UK and its European allies, regardless of the precise configuration of the post-Brexit landscape.

PROGRAMME

Convenor: John Morison

OPENING

John Morison MRIA, Professor of Law, Queen's University Belfast, UK; Chair of the Ethical, Political, Legal and Philosophical Studies Committee, Royal Irish Academy

INTRODUCTION

David Phinnemore, Professor of European Politics and Jean Monnet chair in European Political Science, Queen's University Belfast, UK

INSIDE, OUTSIDE AND THE POSSIBILITIES OF 'SPECIAL STATUS'

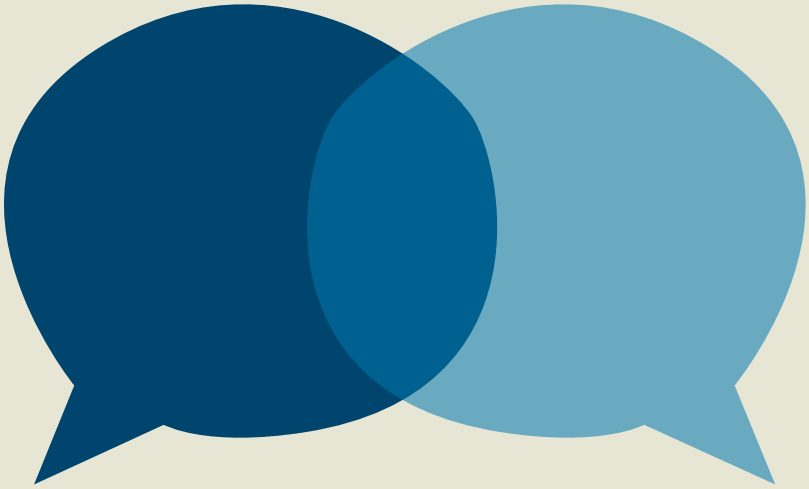
Jo Shaw, Salvesen Chair of European Institutions, University of Edinburgh, Scotland, UK
Trevor Redmond, PhD, Assistant Legal Adviser, Department of Foreign Affairs and Trade, Ireland
Ulrik Pram Gad, Associate Professor Cultural and Global Studies, Aalborg University, Denmark
Chair: Dagmar Schiek, Professor of Law, Jean Monnet ad personam Chair for EU Law and Policy, Queen's University Belfast, UK

ALTERNATIVES TO EU MEMBERSHIP—EEA, EFTA AND SPECIAL ARRANGEMENTS

Sieglinde Gstöhl, Professor and Director of Studies at the College of Europe in Bruges, Belgium
Christine Kaddous, Professor of Law and Director of the Centre d'études juridiques européennes (CEJE), University of Geneva, Switzerland
Chair: Dagmar Schiek, Queen's University Belfast, UK

CONCLUSIONS

Rory Montgomery, Second Secretary General, EU Division, Department of the Taoiseach, Ireland



Constitutional Conversations, No. 4 of 6

The idea of a republic: freedom and politics

Royal Irish Academy, 8 June 2016
Report by rapporteur Fionn McGrath

Acadamh Ríoga na hÉireann
Royal Irish Academy

MASON HAYES & CURRAN

The preamble to Bunreacht na hÉireann asserts a connection between concern for the common good and the dignity and freedom of each individual. It can be argued that this connection is the distinctive mark of the republican model of politics, impacting on the republican idea of citizenship and law. However, in the contemporary neo-liberal world, which emphasises freedom as individual opportunity, freedom and the common good seem to be incompatible.

This report summarises the fourth 2016 Constitutional Conversation, which focused on Bunreacht na hÉireann's preamble. It considered the connection between individual and collective freedom, addressing the questions of whether these notions of freedom are conflicting and, if not, how we might find new ways of making sense of the republican idea that we flourish as individuals only when all of us flourish within the framework of a legally regulated, political association.

Panellists offered a number of proposals for how best to understand and characterise ideas such as dignity and the common good and to relate them to the broader ideas of freedom, politics and republicanism. An initial concern was how to understand the idea of a republic, and in particular whether the meaning of such ideas is tied to specific historical, cultural and social contexts. The word 'poblacht' speaks in favour of this view, for there is no direct translation in English, suggesting that the framers of the 1937 constitution had a highly specific idea of what a republic is. However, it was pointed out in response that the translation difficulty gave birth to a neologism, 'peopledom', which reaches beyond the context in which it was originally forged. Furthermore, it was suggested that this word creation indicates the importance of the imagination and creativity in the fashioning of a republic; poetry has the potential to play an important role in the process of envisioning alternative notions of republicanism. The poetic figure of the 'metic', the foreigner who is denied citizen rights in her place of residence, was invoked as a way of capturing the spirit of republicanism – the inhabitant of the political association who is both at home and not at home and is engaged in public life nonetheless.

Also discussed were challenges arising from Ireland's globalised economy; this not only presents legal and bureaucratic problems but together with the mass media it encourages low-energy democracy and blinkered vision. Here, too, we may need the imagination in order to reverse the trend. Failures of imagination are evident not only in the inferiority complex Irish politicians display when confronted with economic arguments, but also, for example, in the Dáil's mirroring of the British parliament. A more imaginative approach to questions of freedom and republicanism could help us to recognise the law's fluid, processual nature rather than viewing it as something which is set in stone.

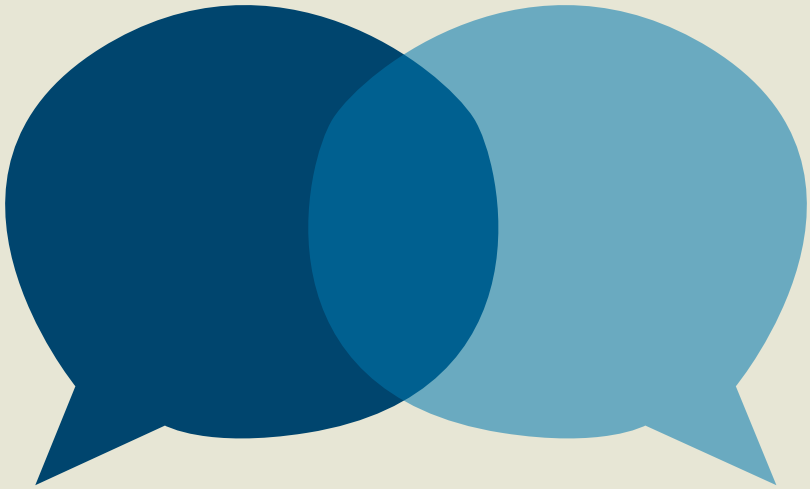
This reinvigoration of the political imagination is to be achieved through art and education. Socio-economic progress, too, requires artists and originality. However, the politicisation of art and poetry must be avoided; rather they must be integrated into our institutions and our ways of life: in particular, into our educational institutions and practices, where we must encourage self-directed learning and foster critical thinking. The Leaving Certificate, with its emphasis on 'points' and memory, is a factory model of education, which must be replaced not simply for reasons of ideology but in order to encourage good economic growth, as the skills it instils are increasingly redundant in the contemporary global context.

The concluding part of the panel discussion focused on the relationship between the ideas of a republic and the common good. At this point the initial view that such ideas have meaning only in highly specific historical contexts was directly challenged. The counter-argument was made that such ideas are aspirational and always retain a certain distance from the actual practice of politics (Jefferson

maintained that ideas have a life of their own). It was claimed, furthermore, that freedom is not a natural property but develops in part through engagement in political processes. This implies that the state contributes to the full development of freedom and hence must protect the development of freedom legally. Conversely, freedom in the sense of collective self-determination enables us to create new ideas of the common good through engagement in political processes. We must see notions of freedom and the common good, then, not as fixed but as fluid ideas, and appreciate the dynamic nature of republicanism.

The subsequent open discussion thematised the apparent dissonance between universal and particular understandings of concepts such as freedom and republicanism. In addition, worries were expressed that the free market was wrongly seen to be diametrically opposed to ideas of freedom and the common good. The case was made for viewing the market, too, as a fundamentally dynamic concept. Other topics discussed included the importance of dignity and prudence and their place within a republican framework. Here too it was suggested that art and the imagination might help us to understand the meaning and political relevance of these ideas.

Convenor and chair: Maeve Cooke MRIA
Panellists: Richard Bourke, Department of History, Queen Mary University of London; Mark Patrick Hederman, Abbot of Glenstal Abbey; Iseult Honohan MRIA, School of Politics and International Relations, UCD; Nerys Williams, School of English, UCD



Constitutional Conversations, No. 5 of 6

Digital citizenship

Royal Irish Academy, 30 June 2016

Report by rapporteurs Jennifer Cobbe and Louise O'Hagan

Acadamh Ríoga na hÉireann
Royal Irish Academy

MASON HAYES & CURRAN

INTRODUCTION

This Constitutional Conversation on 'Digital Citizenship', the fifth in a series of six, began with the participants being guided into the reality of the 'digital world' to consider how the environment we operate in has changed significantly in recent years. The main conversational topic – 'digital citizenship' – was introduced, bringing the buzzwords 'privacy', 'security', 'data protection' and 'big data' into the conversation. It was clear that the government has major challenges around privacy, security, and data rules, as well as worries about data protection, but we were encouraged to question whether it is really about protecting the citizen. As citizens we must have interest in this – after all, it is 'our' data.

CHALLENGES OF TECHNOLOGY FOR DIGITAL NATIVES

This part of the discussion was led by two Donegal Youth Councillors who are 'digital natives', meaning that they don't know the world without the Internet and that, like many their age, they grew up online. The main focus was on the technology that young people use and the challenges that they face in doing so. The positive aspects of technology and the ubiquity of the Internet were mentioned before delving into the reality of the negative effects it is having on the younger generation.

The positives discussed were the benefits the Internet provides, particularly for those living in rural areas, where it has made it possible to keep in contact with friends and family far more easily than in the past while also providing entertainment and online shopping. The negatives were a significantly longer list, including body image pressures caused by social media and stress over how individuals are perceived, the prevalence of sexual harassment on social media (particularly experienced by young women), and catfishing (where individuals create fake profiles on social media and enter into romantic relationships online with real people). It was clear that stress can be caused by the way in which young people are expected to use the Internet. It was also mentioned that few laws are in place to protect people online, raising the question of where young people should turn for help if there is a problem. This is the reality of what the younger generation deal with, and generally speaking there is no previous knowledge that could be applied – they are the guinea pigs in this social experiment.

The question of what ownership we have of the things that we choose to publish on social media was then discussed. For the younger generation it is the norm to 'publish' their lives online – these 'digital citizens' have grown up with the Internet, constantly under pressure to post photos and tag themselves in locations. As a result of this, privacy has changed as the younger generation has grown up with a digital self where they can choose what is shown, and have learned to get 'likes' and social cachet in return for their photos and posts. Two Ps – 'public' and 'permanent' – were discussed; both should be assumed of all posts online but people often do not understand that you cannot retrieve what has been posted online. It is important to remember that what is posted online can affect job applications, and we must question how we teach the younger generation about the permanence and the public nature of what has been posted.

DONEGAL YOUTH SERVICE WEB SAFETY SURVEY

Statistics from the Donegal Youth Service web safety survey, which looked at the Internet habits of young people, were referred to. The survey revealed that females use social media twice as much as males, are under more pressure to share photos, are more likely to report abuse, and are more 'savvy'

with privacy settings than males. The survey also reported that young Internet users spend on average four hours a day online, one in ten has received threats on social media, and one in three has been cyberbullied. The survey clearly highlights the need for parents to become more involved. Young people do not often have an insight into issues around Internet use. Therefore, parents need to be aware of the dangers of the Internet and to teach young people about issues such as privacy and copyright, and they need to promote knowledge and understanding of safe Internet use.

INDUSTRY EXPERT

The discussion then moved on to how we occupy ourselves with data, with contributions from an industry expert. At present we are at the heart of digital transformation and we are not sure about the implications for privacy. No one is fully aware what data is being used for, which makes it very difficult to know if it's for our benefit or not. Furthermore, data is not held on physical devices any more: it has become virtual and is often in 'the cloud'. We don't necessarily know where data goes and therefore we don't know what the threat to privacy really is, but knowing how data is used can help us understand why it is important.

THE LEGAL COMPONENT

Further discussion centred on the Irish constitution and the role it plays in relation to data. The constitution dates from 1937 and therefore says nothing about data as such, and there has been little constitutional litigation in this area to update it. The biggest limit on the state's power comes from the fundamental rights provisions. While these say next to nothing about data, Article 40.3 sets out personal rights and there has been a long trend of 'inventing' rights and shoehorning them in under this provision. One of these rights is privacy, and while case law does not directly cover data there is the ability to stop law enforcement becoming involved in private communications, which means that the state cannot access personal communications data without a warrant. There are gaps when it comes to digital citizenship, and the limitations on abuse remain unclear.

Discussion moved on to the role of EU law, which takes data protection and privacy very seriously and provides interesting and relevant material. The EU's Charter of Fundamental Rights includes a specific right to data protection in Article 8, which is distinct from the traditional right to privacy and is seen in virtually no states. Furthermore, the EU has introduced the General Data Protection Regulation (GDPR), due to come into force in 2018. This will set out clearly how data can be used and regulate the role of government, while the clear principle from European Court of Justice (ECJ) case law is that if the government is going to share data in any way, it needs to be transparent about it. The new legislation will also give citizens more control over private use of their data, allowing governments to impose penalties of up to €20 million on companies and businesses that do not comply with the GDPR.

The rights individuals have in relation to their data were then discussed. Ownership is essentially determined by copyright law and the basic rule is that whoever creates it owns it, although there are many exceptions. The restrictions on the use of information concern how it can be moved around – even when an individual does not own data they might still have rights to it.

DISCUSSION AND QUESTIONS

The discussion began with an audience member asking what 'catfishing' is, highlighting the generation gap between digital natives, who understood this term, and others. It moved on to US politics and the role of data in the last two US presidential elections. Data profiling played a particularly significant role in President Obama's two campaigns. As well as profiling, calculations of data were used to identify which fundraising strategy was most effective for each demographic. The pitch for fundraising could then be tailored to the target audience's demographic profile, and messages customised and adjusted based on what works in real time rather than through trial and error.

The question of what kind of guidance for Internet usage young people need was then discussed. Young people are not educated in privacy, Internet usage or online safety generally. This could be taught in school so that teenagers know what to do in relation to, for example, privacy settings. There was then discussion as to whether young people want to be taught specifically how to protect themselves rather than about privacy generally, with a view being expressed that teaching younger ages, especially pre-teens, about privacy and online safety is easier and more effective than attempting to do this when children enter the rebellious teenage years. The conversation moved on to whether young people should be taught how to behave online in the same way as we teach them how to act in person, i.e. should there be digital civics classes? It is important to remember that current big players (e.g. Facebook, Google) may not always be so dominant, so instead of focusing on strategies for specific sites which could be superseded by competitors, it should be recognised that teaching good ethics, manners, and common sense online is key, along with giving users the tools from a young age to enable them to exist safely online in a general sense, so that online safety becomes the norm.

What the constitution means in relation to 'digital citizenship' was then discussed. We are citizens both of Ireland and of the global digital sphere, so this may lead to jurisdictional issues. Digital citizens require digital protection, but can the state provide this? If so, should this be the state that users are in or the state where the website is based? Discussion then moved to how some companies encourage staff to have a presence on social media to promote brand awareness. There are of course dangers with developing a profile in this way. It was pointed out that for individuals the position may be particularly problematic: people feel that that there is little choice about being online as it is difficult to be active in our society without an online presence. The effect of this may be that we are all subject to the forces – both negative and positive – that an online existence brings.

The challenge of ethics was then raised: whether software and technology companies have or should have ethics advisors or ethics boards, or whether ethical issues are left to individual developers or product teams. Do the ethical decisions (or non-decisions) necessarily taken in many aspects of the industry match the expectations of their customers, the users of their products, and their trading partners? What is the role for the states in this?

The conversation moved to comparing the 'tyranny of data' in the private sector with the tyranny of not having access to data in the public sector. The public sector often has strict restrictions on what can be done with data and there are often limits on data sharing between public sector bodies. This creates a double standard whereby there are few protections on the use of data in the private sector but many in the public sector. Perhaps the issue is not one of data sharing but of governance – sharing does happen to some extent in the public sector and can provide benefits to government, so rather

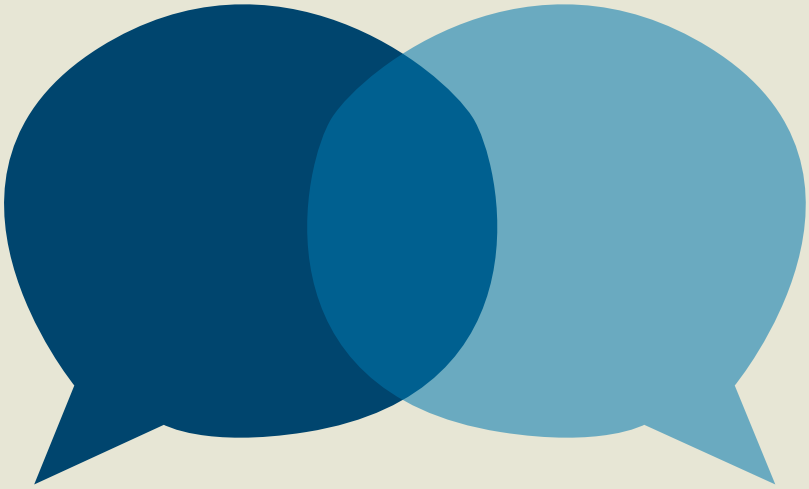
than continuing to restrict it we perhaps need to focus on allowing data sharing and regulating it under a proper framework with privacy issues at the centre.

The discussion was then widened to include big data, the Internet of things, and algorithmic government. It was mentioned that systems that learn from the behaviour of people may have the potential to reflect the true nature of humanity – although it is difficult to incorporate into data the societal and cultural standards that temper some of the harsher elements of human nature. The conversation then focused on algorithms rather than data, discussing how in many US jurisdictions judges are using sentencing databases. Using these systems, convicted people are profiled and their sentence is tailored to what the computer determines their likelihood of reoffending is, based on historical data. The example was also given of a chatbot that challenges parking tickets, taking in information from the user and determining the likelihood of a successful challenge based on experience gained in previous challenges, which has been hugely successful. A further example was predictive policing, which profiles individuals and determines, based on historical data, the likelihood of them offending, and which is beginning to be rolled out in some parts of the US, China, and Russia. The discussion emphasised that it is important to think about how the state can use data rather than thinking only about the data itself.

CONCLUDING REMARKS

The general conclusion was that the word 'privacy' is fuzzy and ill-defined and that we often have little or no idea what we are talking about when we refer to the right to privacy, particularly in relation to data. Indeed, the discussion raised an abundance of questions that may never be answered. The aftermath of Brexit lingered throughout the conversation, and in closing it was suggested that maybe there should be a vote for digital citizens to leave or remain in the online world.

Convenors: John Morison MRIA; Andrew Power, Dún Laoghaire Institute of Art, Design and Technology
Chair: Noreen O'Carroll, Royal College of Surgeons in Ireland
Panellists: Oisín Tobin, Senior Associate, Mason Hayes & Curran; Anthony Behan, IBM; Aoife Gillespie, Donegal Youth Councillor; Hannah Healy, Donegal Youth Councillor



Constitutional Conversations, No. 6 of 6

Ethics and commemoration

Royal Irish Academy, 24 November 2016

Report by rapporteurs Andrew Godden and Cira Palli

Acadamh Ríoga na hÉireann
Royal Irish Academy

MASON HAYES & CURRAN

INTRODUCTION

A political decision has made 2012–22 the 'Decade of Centenaries' on the island of Ireland. Commemorative events have been, are being and will be held on both parts of the island to mark some of the most important events in that crucial decade of Irish history a hundred years ago. Now that the decade is almost halfway through, it is an opportune moment to reflect upon how commemorations already undertaken might inform coming commemorations. Reflecting on the ethical components of collective commemoration can provide a framework for handling contested and divisive narratives of the past in a manner that is inclusive and tolerant and prompts consideration of the often conflicting senses of identity in contemporary Ireland, north and south.

It was to explore these issues that this event, the sixth and final in the Constitutional Conversations series, was convened. The framework on ethical remembering that underpinned the event is available on the Royal Irish Academy website.[1]

PANEL ONE

The first panel provided a cautionary note regarding the pitfalls of commemorative events in divided societies. In the absence of an agreed narrative capable of bridging sectarian divisions, biased accounts of historical events are utilised to further political agendas rather than promoting truth and reconciliation. This suggests a clear need for ethical principles on the part of official agencies to counter self-aggrandising accounts of the past.

Attendees discussed a number of ethical principles, which they regarded as being central to all commemorative projects in the Irish and Northern Irish contexts. These principles were threefold. First, 'contextualisation' should ensure historical accuracy in commemorations that are state-backed. Second, 'revision' of the past must allow for an inclusive approach in recognition of multiple narratives. And third, the 'democratic dissemination' of primary historical sources should facilitate greater access by the public to promote a critical outlook on the empirical record and to foster social dialogue.

The panel contended that the application of these principles could not only facilitate more pluralistic and historically accurate commemoration, but perform a didactic function by promoting greater understanding of important constitutional moments. In furtherance of this argument, attention was drawn to two particular developments in the Republic: the publication of archive material and the recognition of the victims of the revolutionary period. In terms of the former, emphasis was placed on the work of the Irish Bureau of Military History, which, along with the Military Service Pensions Collection, has in recent years released vast amounts of archive material related to the revolution and the Civil War in publicly accessible digital form. These efforts have served to 'democratise' the commemorative process by allowing Irish citizens to view their history from their own perspective. Similarly, there has been a recognition of the anti-revolutionary and non-military casualties of the revolution. This is manifest in the controversial Remembrance Wall in Glasnevin Cemetery in Dublin, a monument that lists the names of all those who died in the Rising—British soldiers, Irish members of the Royal Irish Constabulary (RIC) and civilians. Some argued that such initiatives are illustrative of how ethical principles discussed above can operate in practice. A key question remained, however—what precise ethical principles were being drawn upon and whose definition of the ethical was foregrounded.

[1] Louise Mallinder & Margaret O'Callaghan, 'The Ethics of Commemorative Practices' (31 March 2015) https://www.ria.ie/news/professor-louise-mallinder-and-dr-margaret-ocallaghan-ethics-commemorative-practices

PANEL TWO

In the second panel a sceptical note was sounded as the very concept of 'ethical commemoration' was called into question. The substance of this argument relates to the 'porous' nature of the borders between commemoration, history and politics; it was argued that it is often difficult to separate commemorative acts from broader politics and culture, especially when many of the commemorative acts themselves have been sanctioned by the state. As recent literature on Ireland and commemoration demonstrates, state actors cannot control all meanings of commemoration; they are merely one of a series of actors.

It was suggested that the Northern Ireland example demonstrates how ethical commemoration may be difficult to achieve not only in principle, but also in practice. There was agreement at the Northern Ireland Executive on how to approach the 'Decade of Centenaries' by setting the tone and providing leadership in putting an official acknowledgement process in place. However, it was not subsequently possible to develop a Northern Ireland Executive Programme led by two government departments as originally envisaged. Essentially, the Northern Irish approach could be characterised as a 'bottom-up' endeavour led by culture, heritage, arts and local authorities, civil society organisations and individuals, all of which have played a key role in devising and delivering programmes of talks, exhibitions, drama, site visits, dialogue and discussion on an inclusive basis in the context of a set of principles for remembering in public space. First World War commemorative projects that are UK-wide also had a considerable role in Northern Ireland's centennial commemorations. There have been notable successes such as nationalist willingness to commemorate the First World War, the Somme commemorations in the Woodvale area of North Belfast, and nationalist efforts to include unionists in their reflections on the Easter Rising. However, other northern commemorations have proved more difficult for organisers. For instance, the significance of the Easter Rising to the broadly nationalist part of Northern Ireland proved more difficult to acknowledge at an official level. This was underlined by the withdrawal of the President of Ireland from a Belfast City Council commemorative dinner amid concerns about insufficient cross community support.

It was argued that Northern Ireland's political and civic leaders can learn from their southern counterparts in marking historical milestones in a transparent, democratic and participatory manner. Northern speakers emphasised that they could do with with greater assistance so that best practice and perspectives on the challenges ahead could be shared across the jurisdictions on how to commemorate the past. Though both the Easter and Somme commemorations were agreed to have 'gone well', although it remains unclear to what degree this was on occasion motivated by the desire to entrench existing loyalties, it was recognised that difficult commemorations lie ahead, including commemorating the Civil War and partition. These events, to varying degrees, had enormous implications for the island as a whole. In addition, speakers agreed that it needed to be borne in mind that future commemorations will be shaped by broader contemporary dynamics such as the Brexit negotiations and their impact on British–Irish relations.

CONCLUSIONS

On the one hand, the conversation underscored the complexity of the potential meanings of ethical commemoration in its conceptual and practical senses, while highlighting the genuine need for broad ethical benchmarks; scepticism was, however, reserved. The first panel provided an overview of the debate on ethical commemoration, with the panellists recommending the three principles dis-

cussed above as examples of the way in which ethical precepts can be used in practice. In contrast, the second panel raised fundamental questions as to the viability of the ethical as commemorative talismans. Conceptually, the notion may be contingent upon, and inseparable from, wider political and cultural factors, and in practice in a state such as Northern Ireland in which the legacy of the centenaries is contested, paying attention to ethical commemoration is critical notwithstanding that the outworking of this will underline the difficulty of applying it.

Yet, these issues notwithstanding, some participants agreed that the commemorative projects in the Republic of Ireland are good examples of what is intended to be an ethical commemoration, with a multiplicity of narratives being given public space. It was suggested that the examples cited underscored an emerging spirit of humility, maturity and tolerance in the Republic which, if replicated north of the border, could facilitate a more inclusive and engaging commemorative process across the island. While it was agreed that ethical commemoration remains a contested concept, the discussants favoured greater collaboration between north and south, in the hope of exploiting the cooperative potential of what remains of the 'Decade of Centenaries'. The issue of how to commemorate partition may prove to be its greatest challenge.

Mary E. Daly and Margaret O'Callaghan (eds.) *1916 in 1966: Commemorating the Easter Rising* (Royal Irish Academy, 2007)
Richard S. Grayson and Fearghal McGarry (eds.) *Remembering 1916: The Easter Rising, the Somme and the politics of memory in Ireland* (Cambridge, 2016)

PROGRAMME

Convenors: Margaret O'Callaghan, Queen's University Belfast; Louise Mallinder, Ulster University

PANEL ONE

Explored what ethics can bring to processes of commemoration, focused in particular on exploring the importance and challenges of commemorating constitutional moments, and considered how commemoration can be inclusive of gender, political opinion and religion.

Panellists:
Kristian Brown, Lecturer, School of Criminology, Politics & Social Policy, Ulster University
Catriona Crowe, Member Royal Irish Academy, National Archives of Ireland
Fearghal McGarry, Professor of Modern Irish History, Queen's University Belfast
Chair: Louise Mallinder, Professor of Human Rights and International Law at the Transitional Justice Institute (TJI), Ulster University

PANEL TWO

Reflected on the recent commemorations of the 1916 Rising and Proclamation and explored how ethical principles of commemoration can be applied to the upcoming commemorations of constitutional events.

Panellists:
Deirdre Mac Bride, Cultural Diversity Programme Director, Community Relations Council
Frank Callanan SC, historian and writer
Martin Mansergh, Vice-Chair of the Government-ap pointed Expert Advisory Group on Centenary Commemorations
Mary E. Daly, President Royal Irish Academy
Chair: Margaret O'Callaghan, School of History, Anthropology, Philosophy, and Politics, Queen's University Belfast